

Attachment A – ACL Complaint No. R5-2017-0504
Specific Factors Considered – Administrative Civil Liability
James G. & Amelia M. Sweeney
Sweeney Dairy

The Central Valley Water Board Prosecution Team alleges that the Discharger failed to submit the 2015 Annual Report by 1 July 2016 as required by the Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2013-0122 (Reissued General Order), and accompanying Monitoring and Reporting Program (MRP). For the purpose of applying the State Water Resources Control Board's Water Quality Enforcement Policy's (Enforcement Policy) administrative civil liability methodology, the alleged violation is a non-discharge violation. Each factor of the Enforcement Policy and its corresponding score for the violation are presented below:

Failure to submit 2015 Annual Report: In accordance with the Reissued General Order and the accompanying MRP, a 2015 Annual Report must be submitted for regulated facilities by 1 July 2016. To date, James G. and Amelia M. Sweeney (hereinafter the Discharger) have not submitted this report for the Sweeney Dairy.

Calculation of Penalty for Failure to Submit 2015 Annual Report

Step 1. Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2. Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3. Per Day Assessment for Non-Discharge Violations

The "per day" factor is calculated for each non-discharge violation considering the potential for harm and the extent of the deviation from the applicable requirements.

The per day factor is 0.35.

This factor is determined by assessing the potential for harm of the violation and the extent of the Discharger's deviation from requirements. The potential for harm was determined to be **minor**. The failure to submit the 2015 Annual Report did not increase the amount of pollution discharged or threatened to discharge into waters of the State. However, failing to submit the Annual Report to the Central Valley Water Board hinders the Board's ability to detect and address noncompliance. The Annual Report is a key means through which the Central Valley Water Board evaluates a Discharger's compliance with the Reissued General Order, including the assessment of proper manure application to fields and waste management in a dairy's production area. By failing to provide the information in the Annual Report, the Discharger frustrates the Central Valley

Attachment A – ACL Complaint No. R5-2017-0504

Water Board's efforts to assess the potential impacts and risks to water quality and circumvents the Central Valley Water Board's ability to take necessary enforcement action to correct problems. The regulatory program is compromised when staff resources are directed toward bringing the Discharger into compliance and those resources are not available for other program activities. Since the violation thwarts the Central Valley Water Board's ability to identify water quality risks, the violation has the potential to exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern. This in turn presents a threat to beneficial uses. Therefore, the violation presents at least a minor potential for harm.

The deviation from requirement was determined to be **major**, as the requirement to submit the Annual Report has been rendered ineffective. The failure to submit the required technical report undermines the Central Valley Water Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the Reissued General Order. Because the Discharger failed to submit the report, the Discharger was assessed a major deviation from the requirement.

Initial Liability

The failure to submit an annual report by the 1 July due date subjects the Discharger to administrative civil liability pursuant to Water Code section 13268, subdivision (b)(1), in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Discharger failed to submit a 2015 Annual Report by 1 July 2016 and is therefore 196 days late as of the issuance date of this Complaint. Therefore, the Per Day Assessment is calculated as (0.35 factor from Table 3) X (196 days) X (\$1,000 per day). The Initial Liability Amount is \$68,600.

Step 4. Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided certain findings can be made. The Enforcement Policy also describes three factors related to the Discharger's conduct that should be considered for modification of the initial liability amount: the Discharger's culpability, the Discharger's efforts to clean up and cooperate with regulatory authorities after the violation, and the Discharger's history of violations. After each of these factors is considered for the violation alleged, the applicable factor should be multiplied by the proposed liability amount for the violation.

a) Multiple Day Violations

The Enforcement Policy provides that, for violations lasting more than 30 days, the Central Valley Water Board may adjust the per-day basis for administrative civil liability if certain findings are made and provided that the adjusted per-day

Attachment A – ACL Complaint No. R5-2017-0504

basis is no less than the per-day economic benefit, if any, resulting from the violation.

For these cases, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used.

Here, the Central Valley Water Board finds that the Discharger's failure to submit a 2015 Annual Report is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's failure to submit a 2015 Annual Report has detrimentally impacted the environment on a daily basis, since obtaining regulatory coverage does not result in an immediate evaluation of, or changes in, practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because information that would have been provided by the Discharger pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Discharger's failure to submit a 2015 Annual Report results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with avoided costs of preparing and submitting a 2015 Annual Report.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The Enforcement Policy provides a floor in that the liability shall not be less than an amount that is calculated based on an assessment of daily penalties for the first day of violation, plus an assessment for each five-day period of violation until the 30th day, plus an assessment of one day for each thirty days of violation thereafter (Minimum Approach). Applying this assessment method on the total 196 violation days gives the Central Valley Water Board the discretion to reduce the assessed penalty days to a minimum number of 12 days. However, because this approach generates a Total Base Liability Amount that is not a sufficient deterrent, and because the Discharger's unwillingness to comply with the Reissued General Order undermines the Central Valley Water Board's ability to protect water quality through its regulatory program, the Prosecution Team has increased the number of days of violation above the Minimum Approach to a total number of 48 days of violation.

A calculation of initial liability totals \$16,800 (0.35 per day factor X 48 adjusted days of violation X \$1,000 per day penalty).

Attachment A – ACL Complaint No. R5-2017-0504

b) *Culpability: 1.5*

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is used with a higher multiplier for intentional or negligent behavior. The Discharger was assessed a score of 1.5, which increases the liability amount. As an enrolled dairy, the Discharger is required to comply with the requirements of the Reissued General Order, including the requirement to submit annual reports. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the Reissued General Order, the Discharger failed to comply. The Discharger was well aware of the requirement to submit the 2015 Annual Report, as the Discharger had submitted an annual report for the calendar year 2008 under the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (2007 General Order). The Discharger also failed to submit annual reports for calendar years 2009, 2010, 2011, 2012, 2013, and 2014, and was assessed administrative civil liability for each of these violations (see *History of Violations* below). A factor of 1.5 is appropriate where the Discharger's conduct amounted to intentional or negligent behavior, falling below what a reasonable and prudent person would have done in similar circumstances. Given the fact that the Discharger has chosen to willfully violate the requirement, the maximum culpability score of 1.5 has been applied.

c) *Cleanup and Cooperation: 1.5*

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used with a higher multiplier when there is a lack of cooperation. The Discharger was assessed a score of 1.5, which increases the liability amount. The Discharger was issued a Notice of Violation (NOV) on 15 August 2016, which requested that the report be submitted as soon as possible to minimize liability. The Discharger was unresponsive to the NOV, and did not cooperate with the Central Valley Water Board to come back into compliance. The violation alleged herein is a non-discharge violation and thus cleanup is not applicable.

d) *History of Violations: 2*

Where there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger was assessed the score of 2, which increases the liability. The Central Valley Water Board adopted Administrative Civil Liability (ACL) Order No. R5-2011-0068 on 13 October 2011 for the Discharger's failure to submit the 2009 Annual Report and the Waste Management Plan by the required deadlines, as required by the 2007 General Order and the MRP. In addition, the Central Valley Water Board has

Attachment A – ACL Complaint No. R5-2017-0504

adopted the following ACL Orders against the Discharger: 1) ACL Order No. R5-2012-0070 on 2 August 2012 for the Discharger's failure to submit the 2010 Annual Report as required by the 2007 General Order and the MRP; 2) ACL Order No. R5-2013-0091 on 25 July 2013 for the Discharger's failure to submit the 2011 Annual Report as required by the 2007 General Order and the MRP and for failure to comply with a Water Code 13267 Order issued to the Discharger on 4 May 2012; 3) ACL Order No. R5-2014-0119 on 9 October 2014 for the Discharger's failure to submit the 2012 Annual Report as required by the 2007 General Order and the MRP; 4) ACL Order No. R5-2015-0065 on 4 June 2015 for the Discharger's failure to submit the 2013 Annual Report as required by the Reissued General Order and the MRP; and 5) ACL Order No. R5-2016-0063 on 18 August 2016 for the Discharger's failure to submit the 2014 Annual Report as required by the Reissued General Order and the MRP. Because the Discharger has repeatedly violated the annual reporting requirement in the 2007 General Order and 2013 Reissued General Order, a multiplier of 2 was assessed.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

- a) *Total Base Liability Amount: \$75,600* [Initial Liability (\$16,800) x Adjustments (1.5)(1.5)(2)].

Step 6. Ability to Pay and Continue in Business

The Enforcement Policy provides that “[t]he ability of a Discharger to pay an ACL is determined by its revenues and assets.” The Discharger has the ability to pay the Total Base Liability Amount based on 1) the Discharger owns the Sweeney Dairy, a significant asset, and 2) the Discharger operates a dairy, an ongoing business that generates profits.

Without additional information provided by the Discharger, based on this initial assessment of information available in the public record, it appears the Discharger has the ability to pay the Total Base Liability. Based on the reasons discussed above, no adjustment in liability is warranted.

Step 7. Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require” but only if express findings are made.

The costs of investigation and enforcement are “other factors as justice may require”, and could be added to the liability amount. The Central Valley Water

Attachment A – ACL Complaint No. R5-2017-0504

Board Prosecution Team has incurred a significant amount of staff costs associated with the investigation and enforcement of the violations alleged herein. While staff costs could be added to the penalty, the Prosecution Team, in its discretion, is electing not to pursue staff costs in this matter.

No adjustment to the Total Base Liability Amount has been made based on “other factors as justice may require.”

Step 8. Economic Benefit

Estimated Economic Benefit: \$3,047

The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation. Economic benefit was calculated using the United States Environmental Protection Agency’s (US EPA) Economic Benefit Model (BEN)¹ penalty and financial modeling program, version 5.6.0. BEN calculates a discharger’s monetary interest earned from delaying or avoiding compliance with environmental statutes.

The BEN model is the appropriate tool for estimating the economic benefit in this case. The benefit is calculated by identifying the regulation at issue, the appropriate compliance action, the date of noncompliance, the compliance date, and the penalty payment date.

The Discharger has received an economic benefit from the costs saved by not collecting the required samples and analytical data for manure, process wastewater, irrigation water, groundwater, soil, and plant tissue, and from not drafting and preparing the 2015 Annual Report. This benefit is based on the estimated costs of sampling and preparing the 2015 Annual Report required under the Reissued Dairy General Order (\$3,047). The adjusted combined total base liability amount of \$75,600 is more than the economic benefit amount (\$3,047) plus ten percent as required by the Enforcement Policy.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount: \$3,352*

The Enforcement Policy recommends that the minimum liability amount imposed not fall below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team’s estimate of the Discharger’s economic benefit obtained from the alleged violation is \$3,047. Therefore, the minimum liability amount is \$3,352.

¹ US EPA Economic Benefit Model, or BEN. At the time this document was prepared, BEN was available for download at <http://www2.epa.gov/enforcement/penalty-and-financial-models>.

Attachment A – ACL Complaint No. R5-2017-0504

b) *Maximum Liability Amount: **\$196,000***

The maximum administrative liability amount is the maximum amount allowed by Water Code section 13268, subdivision (b)(1): one thousand dollars (\$1,000) for each day in which the violation occurs. The maximum liability amount is \$196,000 (196 total days X \$1,000 per day).

The proposed liability falls within these maximum and minimum liability amounts.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for failure to submit the 2015 Annual Report is **\$75,600**.